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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, *et al.*,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL, URGING REVERSAL

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Pursuant to Rule 42 of the Rules of this Court, the Public Service Research Council hereby moves for leave to file the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed. Appellee Madison Teachers, Inc. has withheld its consent to the filing of this brief.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government and the tradition of federalism. The Council views the decision of the Wisconsin Supreme Court here for review as posing a serious threat, not only to the individual liberties of countless public employees, but also to the very system of representative, republican government presupposed and protected by our Constitution. While believing that the Appellants herein are seriously and skillfully defending their interests, the Council is none the less concerned that their natural preoccupation with the issues of most immediate relevance to them may so narrow the focus of their attention as to cause them to overlook or not sufficiently to emphasize to this Court the deeper, broader, and more ominous problems raised by this case.

The Wisconsin Supreme Court based its decision on the premiss that free speech and free petition for public employees may be subordinated to, and in certain instances totally engulfed and preëmpted by, the "exclusive-representation" device recently imported into public-sector labor relations from the private sector. If this Court should sustain that premiss, the Council believes and fears, it will inadvertently have created a precedent inconsistent and incompatible, not only with all principles of First and Fourteenth Amendment adjudication heretofore recognized, but also with the

continued existence of those conditions of freedom without which our republican institutions cannot survive. Therefore, the Council hopes and intends in its annexed brief *amicus curiae* to present to this Court the fundamental issues of free speech and free petition involved in this case from the enhanced perspective of observers who, unlike the parties, can fully concern themselves with and have given much consideration to the long-term implications of the issue raised here. The Council feels and submits that its contribution will materially assist this Court in properly establishing the broad context necessary for resolution of the issue, and in identifying and understanding the grave implications which its decision may have for public employees and the process of representative government in the United States.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED v

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER CERTAIN WISCONSIN STATUTORY PROVISIONS, AS CONSTRUED AND APPLIED BY THE WISCONSIN SUPREME COURT, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 4

A. The Wisconsin Supreme Court's Treatment of the Federal Constitutional Issue Raised in This Case Is Ambiguous 4

B. The Federal Constitutional Issue Is Here for Decision Under Whichever Interpretation This Court Gives to the Wisconsin Supreme Court's Opinion 6

II. THE BOARD HAS "STANDING" TO LITIGATE THE CONSTITUTIONALITY OF INFRINGEMENTS UPON ITS OWN DUTIES, RIGHTS, AND IMMUNITIES UNDER FEDERAL LAW, AND UPON THE CORRESPONDING LEGAL RELATIONS OF NONUNION TEACHERS, ARISING OUT OF THE CONSTRUCTION AND APPLICATION AS AGAINST IT OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS 10

Page

A. The Board Has a Duty Under Article IV of and Under the First and Fourteenth Amendments to the United States Constitution to Hear and Accept Petitions From Its Nonunion Teacher-Employees, and an Implied Right and Immunity Under Those Provisions Against Interference With the Fulfillment of That Duty 10

B. Under the Circumstances of This Case, Its Nonunion Teacher-Employees Must Rely on the Board Both to Exercise and to Vindicate Their Constitutionally Guaranteed Liberty 13

III. THIS COURT MUST DETERMINE FOR ITSELF WHETHER THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ABRIDGE THE FREEDOM OF PETITION GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS, OR MERELY DEFINE THE PRIVILEGE OF "NEGOTIATION" UNDER WISCONSIN LAW 15

A. The Wisconsin Supreme Court Based Its Decision on a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation" 16

B. The Assertion by the Wisconsin Supreme Court of a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation" Neither Binds This Court nor Relieves It of Its Duty to Determine the Constitutional Facts in This Case 17

Page

1. Even if the Wisconsin Supreme Court Validly Distinguished Petition From "Negotiation" as a Matter of State Law, This Court Must Decide Whether That Distinction, as Applied, Is Repugnant to to the First and Fourteenth Amendments 18

2. Whatever Its Constitutional Status May Be in Other Contexts, Under the Facts of This Case and in Light of the Peculiarly Critical State of Constitutional Issues in Public-Sector Employment, the "Exclusive-Representation" Device Cannot Be Assumed or Permitted Wholly to Nullify the Freedoms Guaranteed to All Public Employees by the First and Fourteenth Amendments 21

IV. AS A MATTER OF LAW AND FACT, HOLMQUIST'S ACTS CONSTITUTED AN EXERCISE OF THE FREEDOM OF PETITION, AND NOT OF ANY SPECIES OF "NEGOTIATION" CONSTITUTIONALLY DISTINCT FROM PETITION 27

A. The Meeting of the Board Was a Public Meeting, Within the Ambit of the First and Fourteenth Amendments 27

B. The Issues Raised at the Meeting of the Board Were Timely Public Issues Within the Protection of the First and Fourteenth Amendments 29

Page

C. Neither the General Circumstances of the Board Meeting nor Holmquist's Specific Acts Thereat Exhibited Any of the Indicia Rationally Necessary for a Finding That "Negotiation" or "Bargaining" Took Place Between Holmquist and the Board 32

V. BECAUSE THIS CASE DOES NOT PRESENT THE SPECIAL CIRCUMSTANCES UNDER WHICH AN EXERCISE OF THE FREEDOM OF PETITION MAY BE REGULATED OR INCIDENTALLY LIMITED, THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ARE REPUGNANT *PER SE* TO THE FIRST AND FOURTEENTH AMENDMENTS 39

A. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized as the Enforcement or Enunciation of a "Time, Place, and Manner" Regulation 39

B. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Regulation of Conduct Unrelated to Speech and Petition 40

C. Even if Holmquist's Acts Could Rationally Be Characterized as Regulable Conduct Rather Than as Pure Speech and Petition, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Valid Regulation of That Conduct Because the Governmental Interests Advanced in Its Support Involve Direct Suppression of Communication 42

Page

D. Even if Valid Governmental Interests in Regulating Conduct Were Involved Here, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized Because the Limitation That Decision Imposes Upon Freedom of Petition Is not the Least-Restrictive Alternative Available 47

E. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized Under the "Clear-and-Present-Danger" Test 50

VI. THE DECISION OF THE WISCONSIN SUPREME COURT IS REPUGNANT TO THE FREEDOM OF POLITICAL PARTICIPATION, UPON WHICH THE VERY LEGITIMACY OF REPRESENTATIVE GOVERNMENT RESTS 55

A. Public-Sector Labor Relations Are an Inextricable Part of the Political Process 55

B. All Citizens, Whether or not Public Employees and Whether or not Union Members, Have an Equal Interest and Right to Participate in Political Affairs 58

C. Whatever Its Validity May Be in Other Contexts, as Applied by the Wisconsin Supreme Court in This Case, the "Exclusive-Representation" Device Unconstitutionally Elevates the Political Influence of One Class of Citizens Over Another 60

CONCLUSION 62

TABLE OF AUTHORITIES CITED

Cases:

Adderley v. Florida, 385 U.S. 39 (1966) 40

Akio Kuwahara v. Acheson, 96 F. Supp. 38 (S.D. Cal. 1951) 56

	Page
Alaniz v. City of San Antonio, 80 L.R.R.M. 2983 (W.D Tex. 1971)	46
American Fed'n of State, County, and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969)	25
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	50
Askew v. Hargrave, 401 U.S. 476 (1971)	25
Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969)	25
Baggett v. Bullitt, 377 U.S. 360 (1964)	25
Baker v. Carr, 369 U.S. 186 (1962)	12
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	6
Bates v. City of Little Rock, 361 U.S. 516 (1960)	42
Blackburn v. Alabama, 361 U.S. 199 (1960)	20
Board of Educ. v. Allen, 392 U.S. 236 (1968)	12
Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194 (1934)	25
Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956)	12
Bridges v. California, 314 U.S. 252 (1941)	11, 41, 51
Buckley v. Valeo, ____ U.S. ____, 46 L.Ed.2d 659 (1976)	44
Bullock v. Carter, 405 U.S. 134 (1972)	59
Burton v. United States, 196 U.S. 283 (1905)	26
Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961)	24
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	11

	Page
Cantwell v. Connecticut, 310 U.S. 296 (1940)	49
Carrington v. Rash, 380 U.S. 89 (1965)	59
Carroll v. Princess Anne County, 393 U.S. 175 (1968)	39
Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972)	60
City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n., 69 Wis.2d 200, 231 N.W.2d 206 (1975)	4, 5, 16, 17, 21, 24, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 40, 43, 48, 51
Cipriano v. City of Houma, 395 U.S. 701 (1969)	59
Coppage v. Kansas, 236 U.S. 1 (1915)	46
Cox v. Louisiana, 379 U.S. 559 (1965)	40, 41
Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830)	19
Cramp v. Board of Pub. Instr., 368 U.S. 278 (1961)	25
DeJonge v. Oregon, 299 U.S. 353 (1937)	11
Dennis v. United States, 341 U.S. 494 (1951)	51
Dunn v. Blumstein, 405 U.S. 330 (1972)	59
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	11, 31
Edwards v. South Carolina, 372 U.S. 229 (1963)	20
Eisenstadt v. Baird, 405 U.S. 438 (1972)	14
Enterprise Irrig. Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157 (1917)	7
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	40
Evans v. Newton, 382 U.S. 296 (1966)	24
Fiske v. Kansas, 274 U.S. 380 (1927)	20
Freedman v. Maryland, 380 U.S. 51 (1965)	39
Garrison v. Louisiana, 379 U.S. 64 (1964)	44
Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963)	42

	Page
Gregory v. City of Chicago, 394 U.S. 111 (1969)	49
Griswold v. Connecticut, 381 U.S. 479 (1965)	14
Groppi v. Wisconsin, 400 U.S. 505 (1971)	6
Hague v. CIO, 307 U.S. 496 (1939)	11
Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)	59
Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.), *cert. denied,* 423 U.S. 892 (1975)	24
Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)	20
Jacobellis v. Ohio, 378 U.S. 184 (1964)	20
Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974)	11
J. I. Case Co. v. NLRB, 321 U.S. 332 (1944)	23
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954)	7
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	25, 50, 59
Konigsberg v. State Bar, 366 U.S. 36 (1961)	41
Kovacs v. Cooper, 336 U.S. 77 (1949)	40
Kusper v. Pontikes, 414 U.S. 51 (1973)	59
Leathe v. Thomas, 207 U.S. 93 (1907)	18
Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1968)	11
Liverpool, N.Y. & P.S.S. Co. v. Comm'rs of Emig., 113 U.S. 33 (1885)	26
Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 171 P.2d 21 (1946)	56
Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961)	49
Lovell v. City of Griffin, 303 U.S. 444 (1938)	50
Lubin v. Panish, 415 U.S. 709 (1974)	59

	Page
Macallen Co. v. Massachusetts, 279 U.S. 620 (1929)	19
Malloy v. Hogan, 378 U.S. 1 (1964)	11
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968)	25
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944)	24
Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936)	8, 17
NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)	13, 14, 42
NAACP v. Button, 371 U.S. 415 (1963)	19, 50
Napue v. Illinois, 360 U.S. 264 (1959)	20
Newport Light Co. v. City of Newport, 151 U.S. 527 (1894)	7
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	19
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	22, 23
Norris v. Alabama, 294 U.S. 587 (1935)	20
North Carolina v. Alford, 400 U.S. 25 (1970)	20
Norton v. Letton, 271 Ky. 353, 111 S.W.2d 1053 (1937)	56
Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944)	23
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	39
Pickering v. Board of Educ., 391 U.S. 563 (1968)	25, 44, 59
Reynolds v. Sims, 377 U.S. 533 (1964)	59

Page

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 20

St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922) 19

St. Louis S.W.R. Co. v. Arkansas *ex rel.* Norwood, 235 U.S. 350 (1914) 19

In re Sawyer, 360 U.S. 622 (1959) 21

Schenck v. United States, 249 U.S. 47 (1919) 51

Schneider v. Town of Irvington, 308 U.S. 147 (1939) 50

Shelton v. Tucker, 364 U.S. 479 (1960) 25, 42, 49, 59

Sorenson v. Superior Court, 31 Ariz. 421, 254 Pac. 230 (1927) 56

State *ex rel.* Maley v. Civic Action Comm., 238 Iowa 851, 28 N.W.2d 467 (1947) 56

Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) 24

Stromberg v. California, 283 U.S. 359 (1931) 43

Supreme Lodge, K.P. v. Meyer, 265 U.S. 30 (1924) 7

Talley v. Califronia, 362 U.S. 60 (1960) 50

Thomas v. Collins, 323 U.S. 516, *rehearing denied,* 323 U.S. 819 (1945) 15, 54, 57

Thornhill v. Alabama, 310 U.S. 88 (1940) 52, 53, 57

Truax v. Raich, 239 U.S. 33 (1915) 14

United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) 58

United States v. CIO, 335 U.S. 106 (1948) 26, 39

United States v. Cruikshank, 92 U.S. 542 (1876) 61

United States v. O'Brien, 391 U.S. 367 (1968) 40, 41, 42, 43, 47

United States v. Robel, 389 U.S. 258 (1967) 50

United States v. United Mine Workers, 330 U.S. 258 (1947) 44

Page

Vaca v. Sipes, 386 U.S. 171 (1967) 24

Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) 23

Watts v. Indiana, 338 U.S. 49 (1949) 21

Wesberry v. Sanders, 376 U.S. 1 (1964) 59

Wieman v. Updegraff, 344 U.S. 183 (1952) 59

Williams v. Florida, 399 U.S. 78 (1970) 11

Williams v. Rhodes, 393 U.S. 23 (1968) 59

Wilshire Oil Co., Inc. v. United States, 295 U.S. 100 (1935) 25

Wood v. Georgia, 370 U.S. 375 (1962) 21

Wood v. Strickland, 420 U.S. 308 (1975) 12

United States Constitution:

Article VI, Clause 3 ..... 8, 11

First Amendment 4, 9, 10, 14, 18, 19, 20, 21, 22, 26, 27, 29, 31, 32, 38, 39, 41, 44, 45, 47, 49, 50, 53, 54, 55, 61

Fourteenth Amendment 4, 9, 10, 14, 18, 20, 21, 22, 26, 27, 29, 31, 32, 38, 39, 45, 49, 50, 53, 54, 55, 61

Statutes:

Civil Rights Act, 42 U.S.C. § 1983 (1970) 12

Hawaii Public-Employment Act, Hawaii Rev. Stat.,

§ 89-2(5) 36

§ 89-9(a-c) 36

§ 89-13(a)(5) 36

§ 89-13(b)(2) 36

Minnesota Public-Employment Act, Minn. Stat.,

§ 179.63[16] 36

§ 179.65[4] 36

§ 179.66[2] 36

§ 179.68[2(5),3(3)] 36

National Labor Relations Act, 29 U.S.C.

§ 158(a)(5) 36

§ 158(b)(3) 36

§ 158(d) 36

§ 159(a) 22, 23

Page

Wisconsin Municipal-Employment Act, Wis. Stat.,
§ 111.70(1)(d) 4, 36, 37, 48
§ 111.70(2) 4
§ 111.70(3)(a)(1-4) 4

Miscellaneous:

Call, "Federalism and the Ninth Amendment," 64 *Dick. L. Rev.* 121 (1960) 59

Comment, "The Mechanics of Collective Bargaining," 53 *Harv. L. Rev.* 754 (1940) 24

Comment, "Standing to Assert Constitutional *Jus Tertii*," 88 *Harv. L. Rev.* 423 (1974) 14

Congressional Globe, 24th Cong., 2d Sess. (1837) 61

Corwin, "The 'Higher Law' Background of American Constitutional Law" (pt. 1), 42 *Harv. L. Rev.* 149 (1928) 59

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K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* (1967) 56

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BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL, URGING REVERSAL

The Public Service Research Council files this brief *amicus curiae* in support of Appellant Board of Education, City of Madison, Joint School District No. 8, urging this Court to reverse the decision of the Wisconsin Supreme Court.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The interest of the Public Service Research Council in participating as *amicus curiae* in this case is set forth in the Motion for Leave to File Brief Amicus Curiae submitted herewith.

SUMMARY OF THE ARGUMENT

The fundamental issue in this case is whether certain Wisconsin statutory provisions violate the First and Fourteenth Amendments to the United States Constitution because, as construed and applied by the Wisconsin Supreme Court, they deny nonunion public-school teachers the freedom to petition their employer with respect to matters of public concern. That issue is here for decision under whatever interpretation this Court gives to the Wisconsin Supreme Court's opinion.

The Appellant Board of Education has "standing" to litigate the freedom-of-petition issue, both in its own right and as a spokesman for nonunion public-school teachers not now before the Court.

This Court has a right and duty to determine for itself whether the challenged statutory provisions abridge freedom of petition, or merely define the privilege of "negotiation" granted by state law. In so doing, it cannot be bound by the purported distinction between petition and "negotiation" advanced by the Wisconsin Supreme Court. Neither can it assume, as did that Court, that the "exclusive-representation" device has been held to and may constitutionally nullify

freedoms otherwise guaranteed to all public employees by the First and Fourteenth Amendments. And it should not permit such a result in this case.

The record discloses that the acts against which the Wisconsin Supreme Court applied the challenged statutory provisions were not acts of "negotiation", but rather were pure speech and petition concerning public matters properly before a public meeting of a governmental agency. The contrary finding by the Wisconsin Supreme Court is nonrational.

Because speech and petition are involved here, the Appellees have the burden of proving that special circumstances exist to justify regulation or incidental limitation of these freedoms. Such a showing has not been and cannot be made. The limitation of First Amendment freedom countenanced by the Wisconsin Supreme Court cannot be rationalized under any principle of constitutional adjudication heretofore recognized by this Court. It is therefore repugnant *per se* to the First and Fourteenth Amendments.

The decision of the Wisconsin Supreme Court strikes directly at the freedom of political participation, upon which the legitimacy of representative government rests. If this Court permits the "exclusive-representation" device to extend as far as the Wisconsin Supreme Court would allow, it will irretrievably undermine the very foundations of our governmental system.

For these reasons, the decision below should be reversed.

ARGUMENT

I.

THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER CERTAIN WISCONSIN STATUTORY PROVISIONS, AS CONSTRUED AND APPLIED BY THE WISCONSIN SUPREME COURT, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The basic issue in this case is whether Wisconsin Statutes §§ 111.70(1)(d), 111.70(2), 111.70(3)(a)(1, 4) are repugnant to the First and Fourteenth Amendments to the United States Constitution because, as construed and applied by the Wisconsin Supreme Court in the decision below, *City of Madison, Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 69 Wis. 2d 200, 231 N.W.2d 206 (1975), they deny to nonunion public-school teachers the freedom to petition their employer, an agency of their state government, with respect to matters of public concern related to the terms and conditions of their employment.

A. The Wisconsin Supreme Court's Treatment of the Federal Constitutional Issue Raised in This Case is Ambiguous.

While the opinion of the Wisconsin Supreme Court is unequivocal on the central issue of state law involved here, its treatment of the crucial federal issue is

ambiguous. As a matter of state law, the Court held that the mere reading to the Board of Education by a nonunion teacher of a statement concerning matters then the subject of negotiations between the Board and the teacher's "exclusive representative" constitutes "negotiation" or "bargaining". 69 Wis. 2d at 208-15, 231 N.W.2d at 211-14.

As a matter of federal law, however, two interpretations of the Wisconsin Court's opinion are possible. At one point, the Court acknowledged that its affirmance of the decision of the Wisconsin Employment Relations Commission might "infringe upon the freedom to speak and to petition the federal and state governments". But it went on to state that such an infringement, if found, would be "within the limits imposed on the restriction of those rights by United States Supreme Court decisions and the decisions of [the Wisconsin] court." *Id.* at 211, 231 N.W.2d at 212. This language strongly indicates that the Court independently judged its own construction and application of state law against federal constitutional standards. At another point, none the less, it described

> [t]he question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit [as having] been answered in the affirmative. None of the parties to this action disputes that. *Now the question is whether the activity herein complained of by [the Union] * * * qualifies as bargaining and can, therefore, be restricted under [Wisconsin law].*

Id. at 212, 231 N.W.2d at 213 (emphasis supplied). This language, and especially the conclusory "therefore" clause, suggests that the Wisconsin Court assumed that

this Court had heretofore settled all relevant questions of federal constitutional law, and that it might therefore limit its own role to one of interpreting state law.

Thus, an ambiguity exists with respect to the apparent basis of the decision below in state or federal law. This Court need not resolve that ambiguity, however, to reach and decide the federal constitutional issue.

B. The Federal Constitutional Issue Is Here for Decision Under Whichever Interpretation This Court Gives to the Wisconsin Supreme Court's Opinion.

Under either possible interpretation of the Wisconsin Court's decision, the federal constitutional issue is squarely presented in this appeal. If this Court adopts the first reading of the opinon below, it "must * * * accept the construction that the Supreme Court of Wisconsin has put upon the * * * statute" and address the question of "the constitutionality of a state law that categoricaliy prevents a" nonunion public employee from petitioning his employer at a public meeting with regard to matters related to the terms and conditions of his employment. *Groppi* v. *Wisconsin*, 400 U.S. 505, 507-08 (1971); *accord, Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61 n.3 (1963).

If this Court adopts the alternative reading of the Wisconsin Court's decision, the same result obtains. The assumption – or even the assertion – by a state court that its opinion rests exclusively on state law cannot

foreclose further review. "This [C]ourt must determine for itself whether the suit really involves any Federal question * * *." *Newport Light Co.* v. *City of Newport*, 151 U.S. 527, 536-37 (1894) (and cases there cited). Here, any argument that the Wisconsin Court's decision rests upon a state-law ground adequate to preclude federal review and reversal fails, for three reasons.

First, "the duty rests on this Court to decide for itself facts *or constructions* upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954) (footnote omitted; emphasis supplied). The rule of deference to "the construction of a local statute approved by the state court of last resort * * * does not apply where this [construction] is fanciful and amounts to a mere subterfuge." *Supreme Lodge, K.P.* v. *Meyer*, 265 U.S. 30, 38 (1924) (opinion of McReynolds, J.) (and cases there cited). Neither is it applicable "where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrig. Dist.* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917). As shown in Part IV(C) *infra*, the "finding" of the Wisconsin Supreme Court that a petition to an agency of state government by a public employee at a public meeting constitutes "negotiation" or "bargaining" is so lacking in rationality as to be "fanciful" or "essentially arbitrary" – making it at least appropriate, if not necessary, for this Court "to inquire whether [the Wisconsin statute] is fairly susceptible of the construction adopted by the state court." *Meyer*, 265 U.S. at 38.

Secondly, if the Wisconsin Supreme Court limited its decision to a construction of state law *on the erroneous assumption that certain prior decisions of this Court had already foreclosed the federal constitutional issue in this case,* its conclusion depended upon *its own* faulty construction and application of decisions of this Court. And that construction is not binding here. *Morehead* v. *New York* ex rel. *Tipaldo,* 298 U.S. 587, 621 (1936) (Hughes, C.J., dissenting). Therefore it remains the province of this Court to decide the underlying federal question upon which depends the adequacy of the state-law ground advanced by the Wisconsin Supreme Court.

Finally, this Court should reject any contention that the Board has somehow "waived" its right to contest whether the Wisconsin statutory provisions in issue here are repugnant to the United States Constitution as applied. For neither the propriety nor the existence in fact of any "waiver" can be established under the circumstances of this case. State officials, to be sure, may properly concede litigable issues related to their exercise of a right, power, privilege, or immunity peculiar to them under state law; *but they cannot constitutionally proffer a binding consession which extinguishes any disability, duty, or liability imposed in the interest of others by the United States Constitution. See* U.S. Const. art. VI, cl. 3. Moreover, what the Board has, in logic, not sought to dispute throughout this litigation is merely that: *if* the actions of the nonunion teacher Holmquist could rationally be categorized as "negotiation" or "bargaining" under Wisconsin law; and *if* that categorization as a matter of state law brought

those actions within a further category of "negotiation" or "bargaining" which, as a matter of applicable federal precedents, could be limited through the "exclusive-representation" device without affront to the First and Fourteenth Amendments; *then and only then* would the latter precedents obviate further debate on the federal question, *by hypothesis.* But these preconditions to "waiver" have not been satisfied in this case – because, as shown in Part IV(C) *infra,* the Wisconsin Court's "finding" that Holmquist's actions constituted "negotiation" or "bargaining" under state law is nonrational; and because, as shown in Part III(B)(2) *infra,* this Court has never held and should not now hold that the "exclusive-representation" device may constitutionally be employed to stifle the exercise of freedom of petition by public employees, in any context or for any reason.

Therefore, the federal constitutional issue is squarely presented no matter how this Court chooses to read the decision of the Wisconsin Supreme Court.

II.

THE BOARD HAS "STANDING" TO LITIGATE THE CONSTITUTIONALITY OF INFRINGEMENTS UPON ITS OWN DUTIES, RIGHTS, AND IMMUNITIES UNDER FEDERAL LAW, AND UPON THE CORRESPONDING LEGAL RELATIONS OF NONUNION TEACHERS, ARISING OUT OF THE CONSTRUCTION AND APPLICATION AS AGAINST IT OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS.

Although the fundamental issue in this case is the extent to which Wisconsin may employ the "exclusive-representation" device to deny *to nonunion public employees* the freedom to petition their employer with respect to matters of public concern related to the terms and conditions of their employment, the Board has "standing" to litigate the question both because the United States Constitution imposes upon it a duty measured by its employees' right to petition, and because those employees affected by the decision below must rely upon it to vindicate their interests in this action.

A. The Board has a Duty Under Article VI of and Under the First and Fourteenth Amendments to the United States Constitution to Hear and Accept Petitions From Its Nonunion Teacher-Employees, and an Implied Right and Immunity Under Those Provisions Against Interference With the Fulfillment of That Duty.

The First Amendment, through the Due Process Clause of the Fourteenth, enjoins the States to "make

no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *DeJonge* v. *Oregon*, 299 U.S. 353, 364-65 (1937); *Hague* v. *CIO*, 307 U.S. 496, 519 (1939) (opinion of Stone, J.); *Bridges* v. *California*, 314 U.S. 252, 277 (1941). This injunction applies against the States the same strict standard which restrains the federal government. *See Williams* v. *Florida*, 399 U.S. 78, 106-07 (1970) (Black, J., concurring in part and dissenting in part), *quoting Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). Under that standard, freedom of petition comprehends any demand for an exercise of governmental authority in furtherance of the interests and prosperity of the petitioners. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961). It extends to "every person or group engaged * * * in trying to persuade [legislative] action". *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) (Burger, J.). And it protects the "approach of citizens or groups of them to administrative agencies". *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). Indeed, the Amendments reach even an individual public employee's approach to his employer on "matters of a local nature". *Jannetta* v. *Cole*, 493 F.2d 1334, 1337 n.5 (4th Cir. 1974).

Pursuant to Article VI, cl. 3, the members of the Board have taken oaths to support the United States Constitution, including the First and Fourteenth Amendments. As against the Board's own teacher-employees – and irrespective of the membership or nonmembership of those teachers in any labor union – the members of the Board have a constitutional duty

coextensive in substance with the teachers' constitutional right to present demands for an exercise of governmental authority in furtherance of the teachers' interests and prosperity. Furthermore, a necessary concomitant of this constitutional duty is a constitutional "right to be free from direct and deliberate interference with the performance of the * * * duty". *Brewer* v. *Hoxie School Dist.*, 238 F.2d 91, 99 (8th Cir. 1956). And the existence of the latter right implies a concomitant constitutional immunity from any legislative, executive, administrative, or judicial command of state government purporting to interfere with, control, or prevent the fulfillment of that duty or the exercise of that right.

The existence of this duty, and of its concomitant right and immunity, is sufficient to confer "standing" on the Board to litigate the issue of its nonunion teacher-employees' freedom of petition, which measures the extent of that duty, right, and immunity. Believing that the challenged provisions of Wisconsin law are unconstitutional, the members of the Board "are in the position of having to choose between violating their oath and taking a step – refusal to comply with [the decision of the Court below] – that would be likely to bring their expulsion from office * * *. There can be no doubt that [they] thus have a 'personal stake in the outcome' of this litigation." *Board of Educ.* v. *Allen*, 392 U.S. 236, 241 n.5 (1968), *citing Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *See also Wood* v. *Strickland*, 420 U.S. 308, 322 (1975) ("school board member is not immune from liability for damages under [42 U.S.C.]

§ 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [a] student").

B. Under the Circumstances of This Case, Its Nonunion Teacher-Employees Must Rely on the Board Both to Exercise and to Vindicate Their Constitutionally Guaranteed Liberty.

The Board has "standing" to litigate the issue of its nonunion teacher-employees' freedom of petition not only because the decision of the Wisconsin Court impinges upon its own constitutional duty, right, and immunity, but also because of its special relationship to those employees as their employer and as the immediate recipient of their petitions.

This Court has repeatedly granted litigants "standing" to assert constitutional *jus tertii* in order to avoid "dilution" of the legal relations of third parties not before the bar. *E.g.*, *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449, 466 (1958) (organization granted standing to raise constitutional liberties of its members where individuals' freedom of association would otherwise have been infringed). A number of opinions have considered "the impact of the litigation on the third-party interests" in terms of whether the asserted freedoms of the third parties "are likely to be * * * adversely affected unless those rights are considered in a suit involving" parties before the Court who have a special relationship to the third parties.

Eisenstadt v. *Baird*, 405 U.S. 438, 445-46 (1972), *citing Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). From these opinions, the commentators have concluded that, where such a relationship exists, a litigant "should always be granted standing to claim that the imposition of a duty on him affects his behavior in such a way that the constitutional rights of third parties are impaired." Comment, "Standing to Assert Constitutional *Jus Tertii*", 88 *Harv. L. Rev.* 423, 432 (1974) (footnotes omitted).

Such a special relationship exists here, for two reasons. First, this Court has already recognized the employer-employee nexus as a basis for "standing" to assert constitutional *jus tertii*. *Truax* v. *Raich*, 239 U.S. 33, 38-39 (1915). More fundamental is the petitioner-recipient connexion unique to this case because of its public-employment context. The Board is not merely an advocate of the rights of its nonunion teacher-employees to petition. *See Eisenstadt*, 405 U.S. at 445. Rather, it is the necessary agency to which those teachers must look and upon which they must rely in exercising their First and Fourteenth Amendment freedoms. This renders its claim to "standing" especially compelling. Comment, 88 *Harv. L. Rev.* at 441. In addition, the nonunion teachers "are not themselves subject to prosecution [under the challenged Wisconsin statutory provisions] and, to that extent, are denied a forum in which to assert their own rights". *Eisenstadt*, 405 U.S. at 446, *citing NAACP* v. *Alabama*, 357 U.S. at 459. That being so, the Board is the logical – and, at this juncture, the only – party available to vindicate their constitutional interests in a single, expeditious proceeding.

For these reasons, the Board has "standing" to litigate *all* aspects of the freedom-of-petition issue arising out of the decision of the Wisconsin Supreme Court.

III.

THIS COURT MUST DETERMINE FOR ITSELF WHETHER THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ABRIDGE THE FREEDOM OF PETITION GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS, OR MERELY DEFINE THE PRIVILEGE OF "NEGOTIATION" UNDER WISCONSIN LAW.

As Mr. Justice Jackson astutely noted, "[i]t is not often in this country that we now meet with direct and candid efforts to stop speaking * * * as such. *Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.*" *Thomas* v. *Collins*, 323 U.S. 516, 547, *rehearing denied*, 323 U.S. 819 (1945) (concurring opinion; emphasis supplied). Such is the situation here.

A. The Wisconsin Supreme Court Based Its Decision on a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation".

In its opinion, the Wisconsin Supreme Court explicitly assumed the existence of a category of action denominated "negotiation" or "bargaining" which, although admittedly an aspect of constitutionally protected petition and speech, can purportedly be subjected to the "exclusive-representation" device in order to achieve "stability" in public-sector labor relations.

> The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; *the First Amendment rights of those persons are, to that extent, thereby infringed.* But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.
>
> * * *
>
> The question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has been answered in the affirmative.

69 Wis. 2d at 211-12, 231 N.W.2d at 212-13 (emphasis supplied).

The Wisconsin Court then assumed that, if action by a public employee can somehow be characterized as "negotiation" or "bargaining" under state law, then that characterization alone settles all questions of freedom of petition.

> [T]he question is whether the activity herein complained of * * * qualifies as bargaining *and can, therefore, be restricted under* [*Wisconsin law*].

Id. at 212, 231 N.W.2d at 213 (emphasis supplied).

This Court, however, cannot give any credence whatsoever either to these assumptions or to the flimsy card-house of equally erroneous suppositions upon which they stand.

B. The Assertion by the Wisconsin Supreme Court of a Purported Distinction Between Constitutionally Protected Petition and Unprotected "Negotiation" Neither Binds This Court nor Relieves It of Its Duty To Determine the Constitutional Facts in This Case.

This Court is at liberty to conclude that the meaning of the challenged Wisconsin statutory provisions is fixed by the decision of the Wisconsin Supreme Court "as if th[at] meaning had been specifically expressed in the enactment". *Morehead* v. *New York* ex rel. *Tipaldo*, 298 U.S. 587, 609 (1936). Such a conclusion is *not* required here. *See* Part I(B) *supra.* But even if this Court chooses to follow that course, it should not accord the decision below any binding effect on the issue of federal constitutional law raised in this appeal.

1. Even if the Wisconsin Supreme Court Validly Distinguished Petition from "Negotiation" as a Matter of State Law, This Court Must Decide Whether That Distinction, as Applied, is Repugnant to the First and Fourteenth Amendments.

The basic syllogism in the Wisconsin Court's opinion is a glaring non sequitur. It certainly is true that, under Wisconsin law, there is some category of action which may be denominated "negotiation" or "bargaining". And it may be true that, under federal law, there is some form of "negotiation" or "bargaining" which lies outside the protection of the First and Fourteenth Amendments, in that a State may constitutionally require its employees, as a condition of their employment, to participate in such "negotiation" or "bargaining" through the "exclusive-representation" device. But it does not follow that what is, in fact, "negotiation" or bargaining" under state law is *therefore* that unique "negotiation" or "bargaining" arguably unprotected under federal law. The two questions are logically and legally distinct. Moreover, they are separate questions the ultimate resolution of which the Constitution consigns to different tribunals: The one it leaves to the Wisconsin Court, if the latter's construction of state law is not "palpably unfounded". *Leathe* v. *Thomas*, 207 U.S. 93, 99 (1907). The other it entrusts to this Court, under all circumstances.

The Wisconsin Court, by the use of mere verbiage, cannot reduce these two independent questions to a single issue subject to its exclusive jurisdiction. The "proposition [cannot] be maintained that the Constitution meant to prohibit names and not things", or that state action "which is expressly forbidden by words

most appropriate for its description, may be performed by the substitution of a name". *Craig* v. *Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830). "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). For that reason, this Court is "compelled by neither precedent nor policy to give any more weight to the epithet[s]" "negotiation" and "bargaining" than it has accorded to "the various other formulae for the repression of expression that have been challenged" here on other occasions. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964). Neither "negotiation" nor "bargaining" "can claim [any] talismanic immunity from constitutional limitations." Rather, they each "must be measured by standards that satisfy the First Amendment." *Id.*

Therefore, although this Court may adopt as binding the construction which the Wisconsin Supreme Court has put upon the challenged provisions of state law, it "is not bound by the characterization of [those provisions], so far as that characterization may bear upon the question of [their] constitutional effect." *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 348 (1922). Instead, this Court retains the right and duty to consider the "nature and effect" of these provisions unfettered by the State's use of labels. *Macallen Co.* v. *Massachusetts*, 279 U.S. 620, 625-26 (1929). But to do so, it must "regard the substance, rather than the form," and employ "the controlling test * * * found in the operation and effect of the law as applied and enforced by the state." *St. Louis S.W.R.R.* v. *Arkansas* ex rel. *Norwood*, 235 U.S. 350,

362 (1914) (and cases there cited). For "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970).

"Practical consequences", of course, are matters of fact; but, in this case, whether Holmquist's actions constituted protected petition or unprotected "negotiation" or "bargaining" is a question of *constitutional* fact under the First and Fourteenth Amendments with respect to which this Court should make an independent judgment. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 53-54 (1971) (opinion of Brennan, J.), *citing Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *and Blackburn* v. *Alabama*, 361 U.S. 199, 205 n.5 (1960). This is so not merely because the Wisconsin Court's "conclusion of law as to a Federal right and [its] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts". *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927); *accord*, *Norris* v. *Alabama*, 294 U.S. 587, 589-90 (1935); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 659 (1945) (and cases there cited). It is also and more fundamentally important here because of this Court's "solemn responsibility for maintaining the Constitution inviolate". *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). Under the peculiar circumstances of this case, that responsibility compels this Court "to examine 'the evidence [adduced in the state court] to see whether it furnishes a rational basis for the characterization put on it' * * * by the

enunciation of a constitutionally acceptable standard in describing the effect of the conduct." *Wood* v. *Georgia*, 370 U.S. 375, 386 (1962), *quoting* In re *Sawyer*, 360 U.S. 622, 628 (1959). *Indeed, nothing is more important for the disposition not only of this case but also of others that must follow it than for this Court unequivocally and definitively to distinguish protected petition from unprotected "negotiation" or "bargaining", by establishing "standards and criteria, measured against the requirements drawn from [the First and Fourteenth Amendments], and their proper applications". Watts* v. *Indiana*, 338 U.S. 49, 51 (1949) (emphasis supplied).

2. Whatever Its Constitutional Status May Be in Other Contexts, Under the Facts of This Case and in Light of the Peculiarly Critical State of Constitutional Issues in Public-Sector Employment, the "Exclusive-Representation" Device Cannot Be Assumed or Permitted Wholly to Nullify the Freedoms Guaranteed to All Public Employees by the First and Fourteenth Amendments.

"Standards and criteria" are critically necessary here because "[t]he question of whether speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit has" *not* "been answered" – "in the affirmative", or in the negative; in public-, or in private-sector employment; and irrespective of the contrary opinion of the Wisconsin Supreme Court. 69 Wis. 2d at 212, 231 N.W.2d at 213.

No decision of this Court has ever addressed any aspect of the problem of "exclusive representation" for dissenting public-sector employees, and certainly not the clash between the "exclusive-representation" device and the explicit guarantee of the First and Fourteenth Amendments that *all* citizens – whether or not public employees and whether or not union members – shall exercise and enjoy an *equal* freedom to petition their government. Indeed, even in the private sector judicial review has never reached the many serious constitutional infirmities of "exclusive representation". When the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as "intentionally [to] avoi[d] presenting th[is] Court with the 'touchy' and more doubtful questio[n] of * * * ['exclusive representation']." 1 J.A. Gross, *The Making of the National Labor Relations Board* 187 (1974). Thus, when in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), an employer challenged that Act on various constitutional theories,* this Court *avoided* the issue of "exclusive representation" on the ground that the "bargaining" scheme of § 9(a) of the Act did *not* provide for complete exclusivity:

> We said [in another case] that * * * the injunction against the [employer's] entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor

> contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, *"but not as precluding such individual contracts" as the [employer] might "elect to make directly with individual employees." We think this construction also applies to §9(a) of the National Labor Relations Act.*
>
> *The Act * * * does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."*

301 U.S. at 44-45 (footnote omitted; emphasis supplied). Similarly, in a contemporaneous employer challenge to the Railway Labor Act, this Court held that the "bargaining" scheme of that Act did *not* provide for absolute "exclusive representation". *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 548-49 (1937).

Seven years later, *in cases raising only issues of statutory construction*, this Court re-interpreted the "bargaining" scheme of the Railway Labor and National Labor Relations Acts so as to preclude individual contracts (and, therefore, individual negotiations) between a private-sector employer and his employees. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-39 (1944). Neither of these decisions, however, reconsidered the issue of constitutionality raised in *Jones & Laughlin* and *Virginian Ry.*, although the statutory constructions adopted in the latter cases formed the necessary

predicate for their constitutional holdings. *E.g.*, Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 754, 789-91 (1940). The contemporaneous decision in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944), also failed to reach the unconstitutionality of "exclusive representation"; for there, this Court created the "duty of fair representation" in order to *avoid* deciding serious constitutional questions of due process and equal protection. *Id.* at 198.

This history makes clear that the Wisconsin Court's reliance on such decisions as *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944), is misplaced. *See* 69 Wis. 2d at 212, 231 N.W.2d at 213. For neither these decisions themselves, nor the precedents upon which they were based, dealt with any constitutional issue at all. And no other decision of this Court has ever held that the free speech of an employee in the private sector may *constitutionally* be limited by the "exclusive-representation" device.

The unresolved constitutional problem is exacerbated in public-sector employment. It is, of course, clear that *private* employers, absent statutory restriction, may condition employment on severe limitations of their employees' speech and association. *E.g.*, *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). But it is equally clear that "the state * * * governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer". *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 897-98 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296, 298-300 (1966). *Public*

employers may *not* condition employment on their employees' surrender of freedoms secured by the First and Fourteenth Amendments. *E.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-06 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 379-80 (1964); *Cramp* v. *Board of Pub. Instr.*, 368 U.S. 278, 288 (1961); *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960). The lower federal courts have uniformly interpreted and applied decisions such as *Pickering* to preclude state and local governments from penalizing public employees because of labor-union membership. *E.g.*, *American Fed'n of State, County, and Municipal Employees* v. *Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins* v. *City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court). If these lower-court decisions are correct, they logically compel the further conclusion that a public employer cannot limit its employees' freedom to petition for a redress of grievances, through the "exclusive-representation" device or otherwise, on the basis of their mere nonmembership in a labor union.

Given the meagre factual record in the instant case, however, this Court should not address the underlying and complex issue of "exclusive representation" which the Wisconsin Supreme Court erroneously assumed to be already decided. *E.g.*, *Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971); *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U.S. 194, 210-13 (1934); *Wilshire Oil Co., Inc.* v. *United States*, 295 U.S. 100, 102-03 (1935). Certainly it need not do so. But the record is

sufficient for, *and logically compels*, this Court to hold: (i) that a significant, *unanswered* constitutional question exists as to whether the "exclusive-representation" device abridges the freedom of petition of nonunion public employees in *any* application; and (ii) that, *as applied here*, the device is repugnant *per se* to the First and Fourteenth Amendments. For any other disposition of this case – and especially an uncritical acceptance (in any degree) of the Wisconsin Court's gratuitous and erroneous assumption that the First and Fourteenth Amendment issues surrounding "exclusive representation" are somehow settled – will effectively nullify the guarantee of the latter Amendments for all nonunion public employees in those States where the "exclusive-representation" device has been imposed on public-sector labor relations. Moreover, any such disposition of this case will inadvertently anticipate constitutional questions of the utmost public concern and gravity which this Court should avoid unless their decision is absolutely necessary. *E.g., Liverpool, N.Y. & P.S.S. Co.* v. *Comm'rs of Emig.*, 113 U.S. 33, 39 (1885); *Burton* v. *United States*, 196 U.S. 283, 295 (1905); *United States* v. *CIO*, 335 U.S. 106, 124-125 (1948) (Frankfurter, J., concurring).

IV.

AS A MATTER OF LAW AND FACT, HOLMQUIST'S ACTS CONSTITUTED AN EXERCISE OF THE FREEDOM OF PETITION, AND NOT OF ANY SPECIES OF "NEGOTIATION" CONSTITUTIONALLY DISTINCT FROM PETITION.

The basic question of constitutional fact in this case is whether Holmquist's acts fall within the category of petition protected by the First and Fourteenth Amendments, or can constitutionally be denominated a species of "negotiation" or "bargaining" distinct from petition. The record can support only one finding: namely, that those acts constituted an exercise of the freedom of petition.

A. The Meeting of the Board Was a Public Meeting, Within the Ambit of the First and Fourteenth Amendments.

The Wisconsin Supreme Court acknowledged that the Board meeting in issue was a *public* meeting, at least in part, and not a special collective-bargaining session. As the Court stated, "[a]t the * * * meeting, *a portion of time was devoted to public appearances.*" 69 Wis. 2d at 205, 231 N.W.2d at 209 (emphasis supplied). And it emphasized the *public* nature of this part of the meeting by noting that "[s]everal individuals spoke during this time", including the union president. *Id.* at 206, 231 N.W.2d at 210. Moreover, the Wisconsin Court distinguished the *public* portion of the meeting

from a later *non*-public portion during which "the board went into *executive* session and considered the unresolved collective bargaining issues * * *." *Id.* at 207, 231 N.W.2d at 210 (emphasis supplied).

The order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court also implicitly recognized that meetings of the Board are devoted, at least in part, to appearances by the general public. That order (to the extent pertinent here) requires that the Board:

> Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers, Inc.

69 Wis. 2d at 209, 231 N.W.2d at 211. Revealingly, the order does not compel the Board indiscriminately to suppress appearances by *any* citizen on *any* subject, or even appearances by *any* citizen on matters *"subject to collective bargaining"* – which might be appropriate were Board meetings strictly "negotiating" or "bargaining" sessions. Rather, it requires the Board to suppress appearances *only* by *nonunion teachers* who seek to read or present petitions on matters *"subject to collective bargaining"*. Such specificity would clearly be unnecessary were meetings of the Board not conducted as a public forum.

Therefore, whether or not matters "subject to collective bargaining" were raised at the meeting in issue, or are raised as a matter of course at all Board

meetings, this Court should hold that that meeting and all such meetings are *public* for First and Fourteenth Amendment purposes.

B. The Issues Raised at the Meeting of the Board Were Timely Public Issues Within the Protection of the First and Fourteenth Amendments.

The public nature of the Board meeting is highlighted by the public nature of the matters raised at that meeting. As a generality, terms and conditions of public employment are matters of public concern, by hypothesis. Nothing government officials do in the exercise of their authority should be – and, this Amicus submits, constitutionally can be – removed from public concern and scrutiny. For government officials are the agents of society; and their principal has an inalienable right to full knowledge of and to influence the manner in and the means by which they claim to serve the public interest. Furthermore, little pertains more directly to the conduct of government and to the performance of its functions than the terms and conditions of public employment and the process by which they are established. For this process, and its results, in large measure determine what government shall accomplish for its citizens, and what cost it shall exact from them. Therefore, few matters could be of greater public interest than labor relations in the public sector. This is especially true where compulsory-unionism arrangements such as "fair share" are in issue. The contemporary debate over compulsory public-sector

unionism in all its aspects is intense; the issues raised are profoundly difficult; and all segments of society, from commentators to the proverbial man in the street, recognize the serious implications of the problems posed. For the final decision of this issue in favor of compulsory unionism may mark a decisive and fateful turning-point in the history of limited, republican government. *See* Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974). In short, it is difficult to define in broad terms a subject-matter of greater or more immediate public concern than whether a governmental agency should enter into an arrangement which conditions the employment of dissenting public employees upon their financial support of a labor union.

More specifically, in this case the precise purpose of Holmquist's appearance before the Board was to bring the issue of compulsory unionism *to impartial public attention.* As he stated to the Board:

> We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. *2) The findings of this study be made public.* 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal. *4) The results of this written ballot be made public.*
>
> We feel this study necessary because neither the board's negotiators * * * nor Madison Teachers, Inc. * * * has properly addressed the serious issue of fair share and agency shop. We find much confusion in the proposal as it stands and even more on the part of the teachers' interpretations of it.

> * * * *Due to this confusion, we * * * ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible.*

69 Wis. 2d at 206-07, 231 N.W.2d at 210 (emphasis supplied). Even if this statement had been made explicitly in the interest of nonunion teachers alone, its content would nevertheless place it squarely within the sphere of public interest protected by the First and Fourteenth Amendment guarantee of petition. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961). In fact, however, Holmquist presented the request for a public study of "fair share" in his capacity as a citizen representing other citizens, as well as a nonunion teacher representing union members in addition to nonunion teachers.* This is clear from his disclaimer of partiality that *"we wish to take no stand on the* ['*fair-share*'] *proposal itself,* but ask only that all alternatives be presented clearly * * * to the general public * * *." 69 Wis. 2d at 207, 231 N.W.2d at 210 (emphasis supplied). It is hard to imagine, then, how Holmquist's statement could have been more carefully or specifically directed to the public interest in fully opening the "fair-share" debate to general citizen scrutiny, and less to any parochial interest of nonunion teachers in presenting their special position to the Board.

Therefore, even though the issue of "fair share" is concededly a matter "subject to collective bargaining" under Wisconsin law, this Court should hold that it is

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*From the record, it appears that Holmquist was representing a group composed, in significant part, of union members as well as nonunion teachers. *See* 69 Wis. 2d at 204-05, 231 N.W.2d at 209.

also – and was at the Board meeting in question – a matter of *public* interest for First and Fourteenth Amendment purposes.

C. Neither the General Circumstances of the Board Meeting nor Holmquist's Specific Acts Thereat Exhibited Any of the Indicia Rationally Necessary for a Finding That "Negotiation" or "Bargaining" Took Place Between Holmquist and the Board.

Not only was the Board meeting a public meeting at which matters of public interest were discussed; and not only did Holmquist participate in the public portion of that meeting as a citizen raising a matter of public concern for the benefit of all other citizens; but also neither the meeting itself nor Holmquist's actions thereat exhibited any of the indicia which this Amicus submits must be present for a rational finding that "negotiation" or "bargaining" took place between Holmquist and the Board. The Wisconsin Supreme Court, to be sure, cited several elements in support of its erroneous finding that "that meeting certainly was part of the negotiation process" and that Holmquist's presentation of the statement "was in fact negotiating". 69 Wis. 2d at 213-14, 215, 231 N.W.2d at 213-14, 214. But these elements, either singly or in any combination, are insufficient to support its decision.

First, the Wisconsin Court found that Holmquist's "statement went to the very heart of the negotiations." *Id.* at 214, 231 N.W.2d at 214. This, however, confuses *negotiating* with *discussing what others are negotiating.*

For *A* to talk to *B* about some matter which is the subject of negotiations between *B* and *C* is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Secondly, the Wisconsin Court emphasized that Holmquist "was speaking for an *ad hoc* group which was opposed to including a fair-share agreement in any contract being negotiated at that time." *Id.* at 215, 231 N.W.2d at 214. In fact, the record does not support this characterization of Holmquist's *public statement* (whatever may have been his *personal position*), especially in light of the explicit disclaimer that his group "wish[ed] to take *no stand* on the ["fair-share"] proposal itself * * *." *Id.* at 207, 231 N.W.2d at 210 (emphasis supplied). But be that as it may, for *A* to represent *X* and *Y* in a discussion with *B* does not necessarily imply that *A* is negotiating with *B* on their behalf. And any "finding" to the contrary is simply nonrational.

Thirdly, the Wisconsin Court strongly implied that Holmquist was representing public employees directly interested in " 'delet[ing the "fair-share" proposal] from the agreement.' " *Id.* at 214, 231 N.W.2d at 214 (quoting from the opinion of the Wisconsin trial court). Yet for *A* to represent *X* and *Y* with respect to even their most important interests in a discussion with *B* cannot of itself mean that *A* is negotiating with *B* over those interests – no matter how aggressively and insistently *A* champions them. And any "finding" to the contrary is simply nonrational.

Fourthly, the Wisconsin Court emphasized that Holmquist's statement "criticized [the union's] handling of the negotiations [on the 'fair-share' issue]".

Id. at 215, 231 N.W.2d at 214. In fact, the statement criticized *both* the Board *and* the union for not "properly address[ing] the serious issue of fair share and agency shop" in their negotiations. *Id.* at 207, 231 N.W.2d at 210. But for *A* to criticize *B* with respect to how *B* and *C* are negotiating on some matter is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Fifthly, the Wisconsin Court considered it important that Holmquist's statement "imparted * * * a request that the whole fair-share issue be deferred" and suggested "how the issue should be handled" in the future. *Id.* at 215, 231 N.W.2d at 214. In fact, the record shows that Holmquist directed his statement to *both* the Board *and* the union. *Id.* at 206, 231 N.W.2d at 210. But be that as it may, for *A* to suggest to *B* how *B* and *C* should negotiate on some matter is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

Sixthly, the Wisconsin Court found that Holmquist's presentation "was more than a mere statement of a position; it was an argument for it." *Id.* at 215, 231 N.W.2d at 214. If anything, the record discloses that the statement, far from presenting an "argument" or "position", merely suggested a method whereby impartial fact-finders might study and publicize a matter on which Holmquist believed public-school teachers and the general public were too confused to form a coherent "position" or "argument". *Id.* at 206-07, 231 N.W.2d at 210. But even if the Wisconsin Court's characterization is correct, it forms no more than one premiss of a non sequitur. For *A* to cast a statement to *B* in the form of an argument, or to make

an argument to *B* in support of a position, is not necessarily to negotiate with *B* over matters addressed by the argument. And any "finding" to the contrary is simply nonrational.

Lastly, the Wisconsin Court made much of its findings that an "impasse * * * had been reached in the negotiations" between the Board and the union, that "several [union] members [were] present at the board meeting", that the union had "pickets present", and that "[union] representatives address[ed] the board on subjects of collective bargaining negotiations". *Id.* at 213, 231 N.W.2d at 213. To be sure, all of this may have made *what the union representatives said at the meeting* a "part of the negotiation process." *Id.* at 214, 231 N.W.2d at 213-14. But it could not automatically have transformed the act of a third party *unconnected with the union* into an act of negotiation if it otherwise were not such in its own right. For *A* to talk to *B* at a time when representatives of *C* are negotiating with *B* is not necessarily for *A* to negotiate with *B*. And any "finding" to the contrary is simply nonrational.

In sum, each of the seven elements upon which the Wisconsin Court relied for its finding that Holmquist's actions constituted "negotiation" or "bargaining" is a nonrational predicate for the Court's conclusion.

The Wisconsin Court did identify a single element relevant to the question of "negotiation"; but it inexplicably failed to give that element even minimal consideration, let alone controlling weight. At one point the Court defined "negotiate" as

> to communicate or confer with another *so as to arrive at the settlement of some matter:* meet with another *so as to arrive through discussion at some*

> *kind of agreement or compromise about something: come to terms* * * * by meetings and discussions * * *.

69 Wis. 2d at 212-13, 231 N.W.2d at 213 (emphasis supplied), *quoting Webster's New Int'l Dictionary* (3d ed.). This definition, concededly, is appropriate under the Wisconsin statute, which itself defines "collective bargaining" (in pertinent part) as

> performance of *the mutual obligation* of a municipal employer * * * and the representatives of its employes, to meet and confer at reasonable times, *in good faith*, with respect to wages, hours and conditions of employment *with the intention of reaching an agreement* * * * *includ[ing] the reduction of any agreement reached to a written and signed document.*

Wis. Stat. § 111.70(1)(d) (emphasis supplied). Indeed, the definition is appropriate under most public- and private-sector collective-bargaining statutes, which generally define "negotiate" or "bargain" as meeting to discuss certain matters *with the good-faith intent to come, if possible, to a binding agreement. E.g.*, National Labor Relations Act. §§ 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1970); Minnesota Public-Employment Act, Minn. Stat. §§ 179.63[16], 179.65[4], 179.66[2], 179.68[2(5), 3(3)]; Hawaii Public-Employment Act, Hawaii Rev. Stat. §§ 89-2(5), 89-9(a-c), 89-13(a)(5), 89-13(b)(2). Yet, although appropriate in the abstract, this definition cannot rationally be applied to characterize the specific facts of the instant case.

At the public meeting in issue here, the Board had no statutory duty, and Holmquist had no statutory right to require it, to "confer * * * in good

faith * * * with the intention of reaching an agreement * * *." Wis. Stat. § 111.70(1)(d). And, as the Wisconsin Court acknowledged, while the Board "listened to [Holmquist's] statements", "[t]here was no other exchange between [him] and any member of the board"; and his "petitions * * * were never presented to the board." 69 Wis. 2d at 202, 207, 231 N.W.2d at 208, 210. Certainly the record does not disclose that the Board entered into any agreement with Holmquist – for, indeed, as the record does show, Holmquist did not tender any proposal upon which *he* sought agreement. Rather he merely suggested that *the Board and the union themselves agree* to defer the "fair-share" question until a proper, impartial study had been made and publicized.

What the record also demonstrates, moreover, is that, notwithstanding Holmquist's appearance at the public meeting, the Board continued to negotiate in good faith with the union, ultimately agreeing to a settlement *on the union's terms.* As the Wisconsin Court described the negotiations prior to the public meeting,

> [t]wo of [the unresolved issues between the union and the Board] were considered of overriding importance by both sides: (1) The fair-share provision, and (2) the provision for binding arbitration of nonrenewal of teacher contracts and teacher dismissals. The board had opposed both of these issues throughout the negotiations. However, [prior to the public meeting], the chairman of the board's negotiating team indicated, informally and unofficially, to the chairman of [the union's] negotiating team that there was "no way" arbitration for dismissals and nonrenewals would

> be accepted by the board, but there was a "distinct possibility" the fair-share provision could be accepted * * * if [the union] would withdraw its arbitration proposal.
>
> On the other hand, at the [hearing before the Wisconsin Employment Relations Commission] in this case, the chairman of [the union's] negotiating team testified that the union's bargaining strategy was to lead the board to believe that [the union's] primary interest was in fair share when in fact it was arbitration. If this strategem were successful, [the union] could at some point offer to "sacrifice" fair share for arbitration and celebrate the result.

69 Wis. 2d at 204, 231 N.W.2d at 209. At the negotiations subsequent to the public meeting, the Board retreated from its former position, made a concession, and offered the arbitration proposal – which the union accepted. *Id.* at 207, 231 N.W.2d at 210-11. Thus, as a matter of fact undisputed in the record, Holmquist's appearance at the meeting in no way interfered with the collective-bargaining process.

Therefore, on the basis of all of the foregoing considerations – from the public nature of the Board meeting and the public interest in the subject-matter of Holmquist's statement, to the failure of the Wisconsin Court properly to apply the one relevant criterion of "negotiation" or "bargaining" – this Court should hold that Holmquist's appearance at the meeting, as a matter of constitutional law and fact under the First and Fourteenth Amendments, constituted an exercise of the freedom of petition.

V.

BECAUSE THIS CASE DOES NOT PRESENT THE SPECIAL CIRCUMSTANCES UNDER WHICH AN EXERCISE OF THE FREEDOM OF PETITION MAY BE REGULATED OR INCIDENTALLY LIMITED, THE CONSTRUCTION AND APPLICATION OF THE CHALLENGED WISCONSIN STATUTORY PROVISIONS BY THE WISCONSIN SUPREME COURT ARE REPUGNANT *PER SE* TO THE FIRST AND FOURTEENTH AMENDMENTS.

Since under the facts of this case Holmquist's appearance at the Board meeting constituted an exercise of his freedom of petition, the burden is upon the State to demonstrate the existence of special circumstances justifying the regulation or incidental limitation of that exercise. *E.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *Princess Anne County*, 393 U.S. 175, 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *United States* v. *CIO*, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring). The opinion of the Wisconsin Supreme Court is devoid of such a showing.

A. The decision of the Wisconsin Supreme Court Cannot Be Rationalized as the Enforcement or Enunciation of a "Time, Place, and Manner" Regulation.

This Court has often held that the First and Fourteenth Amendments do not preclude government from imposing reasonable "time, place, and manner"

regulations upon speakers – provided that the regulations further a substantial state interest unrelated to the restriction of communication, and do not invidiously discriminate among speakers or ideas. *E.g., Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975), *citing Adderley* v. *Florida,* 385 U.S. 39 (1966); *Cox* v. *Louisiana,* 379 U.S. 559 (1965); *and Kovacs* v. *Cooper,* 336 U.S. 77 (1949). Here, the record demonstrates beyond dispute that Holmquist complied with all applicable "time, place, and manner" regulations. As the Wisconsin Court noted, "Holmquist completed a registration form stating that he wished to speak during [the portion of the meeting devoted to public appearances]", and, when his turn came, "was allowed to speak." 69 Wis. 2d at 205-06, 231 N.W.2d at 209-210.

The order of the Wisconsin Employment Relations Commission upheld by the Wisconsin Supreme Court cannot be rationalized as merely a *new* "time, place, and manner" regulation, either. For, as demonstrated *infra,* that order is an attempt by the State, not to regulate *procedure* only, but to control the *substance* of speech and petition – indeed, *to discriminate invidiously among speakers and ideas in order to further illegitimate goals directly related to the restriction of communication.*

B. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Regulation of Conduct Unrelated to Speech and Petition.

In *United States* v. *O'Brien,* this Court defined the limits of permissible governmental infringement upon protected liberty in the following terms:

> *[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct,* a sufficiently important governmental interest *in regulating the nonspeech element* can justify *incidental* limitations on First Amendment freedoms.

391 U.S. 367, 376 (1968) (emphasis supplied); *accord, Konigsberg* v. *State Bar,* 366 U.S. 36, 50-51 (1961). The Commission's order, however, does not impose restrictions merely on conduct *unrelated to speech;* for the course of conduct involved when nonunion teachers "appear and speak at meetings of the Board * * * on matters subject to collective bargaining" contains *no* element not integrally related to protected speech and petition.

This Court has characterized a *telegram* from a citizen to a public official as a *"pure* form of expression" involving "free speech *alone*", rather than "expression mixed with particular conduct". *Cox* v. *Louisiana,* 379 U.S. 559, 564 (1965) (emphasis supplied). And it has held that such a telegram is also a form of free petition. *Bridges* v. *California,* 314 U.S. 252, 277 (1941). Certainly, then, *the reading of a statement* on matters of public concern by a citizen to public officials at a public meeting is equally a form of "pure" speech and petition, not regulable conduct.

That being so, the limitation imposed by the Commission's order, as affirmed by the Wisconsin Supreme Court, is unconstitutional *per se.* The "balancing test" described in *O'Brien,* after all, applies only to *indirect* infringements upon speech which arise out of valid regulation of *conduct unrelated to speech.* Therefore, it is inapplicable by hypothesis to a *direct*

infringement on *pure* speech and petition; and such an infringement is constitutionally invalid *no matter what governmental interests it serves.*

C. Even if Holmquist's Acts Could Rationally Be Characterized as Regulable Conduct Rather Than as Pure Speech and Petition, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized as a Valid Regulation of That Conduct Because the Governmental Interests Advanced in Its Support Involve Direct Suppression of Communication.

In *O'Brien*, this Court held that

> a governmental regulation is sufficiently justified * * * if it furthers an important or substantial governmental interest * * * *unrelated to the suppression of free expression* * * *.

391 U.S. at 377 (emphasis supplied). State action aimed directly, purposefully, or inevitably at the restraint of protected liberty or of conduct necessarily related thereto is unconstitutional *per se*, and can never be justified by "interest balancing". *See, e.g., Bates* v. *City of Little Rock*, 361 U.S. 516, 523, 526-27 & n.11 (1960); *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449, 464-65 (1958); *Shelton* v. *Tucker*, 364 U.S. 479, 486-87 & n.7 (1960). And it is for the State to identify a legitimate purpose subserved by the regulation. *Bates*, 361 U.S. at 525; *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). Two purportedly legitimate and substantial governmental interests subserved by the Commission's order have

been put forward: one, the interest in avoiding "relative chaos in labor management relations"; and the other, the interest in enhancing the "unity of collective clout" which "advances the welfare of public employees". 69 Wis. 2d at 212 (opinion of the Court), 224 (dissenting opinion), 231 N.W.2d at 213, 219. Neither of these interests is legitimate, because neither is sufficiently unrelated to the suppression of free expression.

The purported interest in "avoiding chaos" is simply an euphemism *for restricting the speech of all public employees not voluntarily affiliated with a majority labor union* on matters subject to collective bargaining *in order to enhance the influence of union members at the expense of dissenters.* Therefore, even if Holmquist's actions could rationally be characterized as regulable conduct, the suppression of such conduct by the Commission's order makes this a case "where the alleged governmental interest in regulating conduct arises in some measure *because the communication* * * * *integral to the conduct is itself thought to be harmful*" (or, suppressing the communication integral to the conduct is itself thought to be beneficial). *O'Brien*, 391 U.S. at 382 (emphasis supplied). And in such a case, the governmental interest advanced can *not* support the infringement on speech. *Id., citing Stromberg* v. *California*, 283 U.S. 359 (1931). Indeed, this Court has already indicated in a closely related context that government has no legitimate interest in enhancing the political influence of one group of citizens to the detriment of another. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the voice of others", this Court held most recently, "is *wholly*

foreign to the First Amendment * * *." *Buckley v. Valeo*, ___ U.S. ___, ___, 46 L. Ed. 2d 659, 704-05 (1976) (emphasis supplied). The applicability of this principle is especially compelling here since the Commission's order must have the inevitable effect of stifling speech on matters of the most intense public concern directly related to the process of self-government in the State of Wisconsin. Part IV(A-B) *supra*. The unconstitutionality of this result is patent. For "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). And "[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment * * *." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 573 (1968).

The purported state interest in public employees' "collective clout" (or "bargaining power") is also illegitimate in the special context of public-sector labor relations. In *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), this Court made unmistakably clear that considerations of employee "bargaining power" can play no role in governmental employment policies. Rejecting the application of the Norris-LaGuardia Anti-Injunction Act to a dispute between the United States (as operator of certain mines) and the mine workers' union, this Court noted that that Act's statement of public policy

> predicates [its] purpose * * * on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize

> in the corporate and other forms of ownership association," and on the consequent helplessness of the worker "to exercise actual liberty of contract * * * and thereby to obtain acceptable terms and conditions of employment." The purpose of the Act is said to be to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment * * *." *These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.*

Id. at 274 (emphasis supplied). If considerations of "bargaining power" "obviously do not apply to the Government as an employer", it follows that government cannot advance such considerations to justify the suppression of some of its employees' First and Fourteenth Amendment freedoms. And nowhere is that conclusion more compelling than with respect to freedom of petition. As one lower court noted, while

> the private employee relies on concerted action through collective bargaining to protect himself from arbitrary and discriminatory action by the employer, the State and its officials are always prohibited such conduct when dealing with its citizen-employees by the Constitution. * * * [W]hile private employees must rely upon collective bargaining and other concerted activities to change management policies, *the public employee always has the guaranteed political avenues, either individually through the ballot box or together through "petition," to effect a change* * * *.

Alaniz v. *City of San Antonio*, 80 L.R.R.M. 2983, 2985 (W.D. Tex. 1971) (footnote omitted; emphasis supplied). If public employees have no constitutional claim to a special mechanism to enhance their "bargaining power" *vis-a-vis* government in part *because they can exercise a protected freedom of petition*, then necessarily there can be no legitimate state interest in enhancing the "bargaining power" of some of those employees *by abridging others' freedom of petition.*

Admittedly, the "bargaining power" *of unions as entities* may in fact be limited where all public employees exercise an equal freedom of petition notwithstanding their union membership or non-membership. But this provides no legal basis for stifling the fundamental freedoms of nonunion employees in order to strengthen unions. For there has never been, and as a matter of constitutional law could never be, any public interest in enhancing the power of any private organization as against government – especially where to do so inevitably involves government in the suppression of personal liberties which the Constitution requires it to defend. *Cf. Coppage* v. *Kansas*, 236 U.S. 1, 16-17 (1915), *with* Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974).

D. Even if Valid Governmental Interests in Regulating Conduct Were Involved Here, the Decision of the Wisconsin Supreme Court Cannot Be Rationalized Because the Limitation That Decision Imposes Upon Freedom of Petition Is not the Least-Restrictive Alternative Available.

The *O'Brien* decision also points out that, even if a governmental interest in some regulation of conduct is substantial and unrelated to the suppression of free speech, the regulation will nevertheless be invalid unless

> the incidental restriction on * * * First Amendment freedoms *is no greater than is essential to the furtherance of that interest.*

391 U.S. at 377 (emphasis supplied). This Amicus submits that the legitimacy of any governmental interest in compulsory public-sector collective bargaining through "exclusive representation" is subject to grave doubt. Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974). But even if this Court assumes *arguendo* the existence of a valid interest in collective *negotiations*, it must none the less find the order of the Wisconsin Employment Relations Commission fatally overbroad. For that order purports to suppress, not only *negotiations* by nonunion teachers, but also *all petitions* on matters arguably "subject to collective bargaining" – which under Wisconsin law includes "wages, hours and conditions of employment" *and* all "subjects reserved to management and direction of the [public employer]" "insofar as the manner of exercise of such functions affects the wages, hours and conditions of

employment of the employees." Wis. Stat. § 111.70(1)(d). The dissent below correctly noted the extreme nature of this prohibition:

> [W]hat matters are subject to collective bargaining? * * * Suppose the teacher wishes to speak on class size or teachers' aides, the establishment of summer programs, school reading projects, in-service training, or the special treatment and handling of problem students. Are these matters subject to collective bargaining on which the board is restricted from receiving information from teachers other than the majority representative of its employees? * * * It is in this sense that the * * * order is vague, not meaning that it cannot be understood and applied by this school board to the facts here, *but because the difficulty of locating its outer limits will have a chilling effect both on the right of teachers to speak and school boards to listen on topics, arguably relatable to bargaining, but directly concerned with the well-being of school children and the community.* The prudent school board would resolve doubts against the right of an individual teacher to speak on marginal or in-doubt topics, and that is what is meant by having a chilling effect.

69 Wis. 2d at 223, 231 N.W.2d at 218-19 (emphasis supplied).

The Commission's order goes far beyond what would rationally be necessary to prevent unauthorized *negotiations.* To achieve *that* end, the order need have required no more than that the Board refrain from discussing matters "subject to collective bargaining" with nonunion teachers *with the intent to enter into a binding agreement with them as individuals or ad hoc groups separate from the "exclusive representative".*

(Such an order, of course, would have found no factual basis in the record, which clearly demonstrates that the Board never entered into any discussions with Holmquist, let alone discussions leading towards a binding agreement. But the very absence of such factual support emphasizes the excessively broad and indiscriminate character of the order which the Commission did enter and which the Wisconsin Supreme Court sustained.)

Under the leading decisions of this Court, the Commission's blanket infringement on First and Fourteenth Amendment freedoms cannot stand. Even if Holmquist's actions combined elements of regulable conduct with protected speech and petition, the Commission's order would nevertheless be invalid unless it "specifically bar[red] only the conduct deemed obnoxious and [was] carefully and narrowly aimed at that forbidden conduct." *Gregory* v. *City of Chicago,* 394 U.S. 111, 118 (1969) (Black, J., concurring). On its face and as applied here, however, the order is *not* "narrowly drawn to prevent the supposed evil" to which it is ostensibly addressed. *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940). Rather, it "pursue[s its purpose] by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). This is impermissible. For where fundamental freedoms are concerned, nothing is more clear than that governmental regulations must be "highly selective"; constitute "sensitive tools"; and regulate "only with narrow specificity" and "[p]recision". *Louisiana* ex rel. *Gremillion* v. *NAACP,* 366 U.S. 293,

296 (1961); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967); *NAACP* v. *Button*, 371 U.S. 415, 433, 438 (1963); *accord*, *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *Talley* v. *California*, 362 U.S. 60, 64, 66-67 (1960) (opinion of the Court; Harlan, J., concurring); *Schneider* v. *Town of Irvington*, 308 U.S. 147-162-64 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938).

Moreover, if wholesale suppression of First and Fourteenth Amendment freedoms was deemed invalid in the private-sector contexts in which the latter cases arose, it must surely be deemed invalid here, where the Commission's order strikes directly at the sensitive *political* relationship between citizens and their government. A regulation which broadly stifles speech *between private parties* is certainly obnoxious to the Constitution; but such a regulation has only a slight capacity for promoting the mischief to the prevention of which the First Amendment was directed, in comparison to a regulation that wantonly suppresses speech and petition *between citizens and governmental officials. See* Part VI *infra.*

E. The Decision of the Wisconsin Supreme Court Cannot Be Rationalized Under the "Clear-and-Present-Danger" Test.

Finally, the Wisconsin Court argued that

> [t]he principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts; the first amendment

> rights of those persons are, to that extent, thereby infringed. *But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.*

69 Wis. 3d at 211-12, 231 N.W.2d at 212-13 (emphasis supplied), *citing Dennis* v. *United States*, 341 U.S. 494, 510 (1951). This application of the "clear-and-present-danger" test is erroneous.

The "clear-and-present-danger" test is appropriately employed to determine when expression *which may be a nexus to suppressible conduct* is itself subject to restraint or punishment. As this Court early noted, "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger *that they will bring about the substantive evils that* [*the legislature*] *has a right to prevent.*" *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) (emphasis supplied). Under this test, a court must determine *both* that the speech sought to be restrained is advocating action that government may suppress, *and* that there is *imminent* danger of that evil taking place as a result of the speech. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges* v. *California*, 314 U.S. 252, 263 (1941).

Clearly, the test cannot be satisfied under the circumstances of this case. The Wisconsin Court identified the substantive "evil" here as "relative chaos in labor-management relations" – by which it apparently meant "negotiation" or "bargaining" with

many groups of employees. But for that Court irrebuttably to presume that every act of petition by a nonunion employee which relates to matters "subject to collective bargaining" will necessarily constitute the sort of expression capable of inducing such "chaos" is simply nonrational. Long ago, this Court pointed out that "no clear and present danger of * * * breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." *Thornhill* v. *Alabama*, 310 U.S. 88, 105 (1940). That observation is equally applicable to petitions of nonunion public employees presented at public meetings, and to the effect of those petitions on "labor stability". Certainly it is an apt description of what the record in this case discloses.

The opinion of the Wisconsin Court presumes that the Board, when faced with a petition by nonunion employees, will act contrary to its duty under Wisconsin law not to negotiate with those employees. There is no rational basis for this presumption in the record. Indeed, quite the opposite. The Board did not negotiate with Holmquist; nor did it refuse to negotiate with the union. And the negotiations between the Board and the union proceeded, without any peculiar delay or difficulty, to a final and satisfactory resolution of the issues and a binding collective agreement. How the Wisconsin Court could conclude, then, that Holmquist's petition, let alone all future petitions of that kind, might validly be suppressed passes all understanding.

The fundamentally defective nature of the Wisconsin Court's reasoning appears in even more stark relief against the background of what Holmquist actually sought to achieve through his petition. Holmquist did not ask the Board to bargain with him, to refuse to bargain with the union, or to do anything else that could rationally be characterized as interfering with the conduct of collective negotiations as prescribed by state law. Rather, he merely advocated that the negotiating parties themselves agree to defer the "fair-share" question for a year, pending an impartial study. Such a request is not and cannot be *per se* a substantive "evil". To be sure, the Board might have been convinced to press the point in negotiations with the union after hearing Holmquist's petition; but the union could have had no claim to complain even of that result providing that the Board continued (as it did) to negotiate in good faith. This Court has often noted that "the group in power at any moment may not impose * * * sanctions on peaceful" exercises of First and Fourteenth Amendment freedoms "merely on a showing that others may thereby be persuaded to take action inconsistent with its interest." *Thornhill*, 310 U.S. at 104. That such persuasion may influence one party's position in "negotiations" or "bargaining" with another cannot be a valid reason for departing from this sound principle. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Id.* But this inherent capacity of speech to persuade cannot permit a State to limit exercises of First and Fourteenth Amendment

freedom by carving out special domains where only one or another select group is allowed to "negotiate" or "bargain" on some topic; for then government could gradually destroy all free discussion. The First and Fourteenth Amendments, however, absolutely preclude such a result. The "free trade in ideas" which they protect "means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537, *rehearing denied,* 323 U.S. 819 (1945). Indeed, it could not be otherwise; for "the whole history of the problem [of free speech and petition] shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given." *Id.*

Therefore, it is clear that this case presents none of the special circumstances under which an exercise of freedom of petition may constitutionally be regulated or incidentally limited in the pursuit of valid governmental interests. That being so, this Court must find that the order of the Wisconsin Employment Relations Commission affirmed by the Wisconsin Supreme Court is repugnant *per se* to the First and Fourteenth Amendments.

VI.

THE DECISION OF THE WISCONSIN SUPREME COURT IS REPUGNANT TO THE FREEDOM OF POLITICAL PARTICIPATION, UPON WHICH THE VERY LEGITIMACY OF REPRESENTATIVE GOVERNMENT RESTS.

The Wisconsin Court's decision not only offends the freedom of petition secured by the First and Fourteenth Amendments, but also strikes at the freedom of political participation which lies at the heart of the republican form of government which the Constitution ordains.

A. Public-Sector Labor Relations Are an Inextricable Part of the Political Process.

No one can rationally deny that public-sector labor relations are part of the political process. Judicial decisions generally define "political" as

> [o]f or pertaining to * * * the conduct of government * * *; of or pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government * * *
>
> [o]f or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of a state * * *.

Webster's New Int'l Dictionary (2d ed. unabg. 1949), *quoted in Akio Kuwahara* v. *Acheson*, 96 F. Supp. 38, 41 (S.D. Cal. 1951); *State* ex rel. *Maley* v. *Civic Action Comm.*, 238 Iowa 851, 857, 28 N.W.2d 467, 470 (1947); *Norton* v. *Letton*, 271 Ky. 353, 360, 111 S.W.2d 1053, 1057 (1937); *Sorenson* v. *Superior Court*, 31 Ariz. 421, 424, 254 Pac. 230, 231 (1927); *Lockheed Aircraft Corp.* v. *Superior Court*, 28 Cal. 2d 481, 484-85, 171 P.2d 21, 24 (1946). The process of structuring public-sector labor relations quite directly "pertains to the conduct of government", and is substantially more than merely "incidental" to the performance of its functions. For, indeed, the process of establishing and administering terms and conditions of employment for those individuals who perform public services in large measure determines what the conduct of government will be with respect to those services. For these reasons, observers unanimously agree that, in the very nature of things, the public-employment relation is "essentially", "inherently", or "unavoidably" political – and that, in fact, public employment should be *defined* as a "political connection between the state and a group of citizens". D.T. Stanley, *Managing Local Government Under Union Pressure* 24 (1972); Project, "Collective Bargaining and Politics in Public Employment" (pt. 4), 19 *U.C.L.A.L. Rev.* 887, 1010, 1011-19 (1972); K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* 115 (1967); Dotson, "A General Theory of Public Employment", 16 *Pub. Admin. Rev.* 197, 209 (1956). *See also* Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974) (*passim*).

The question of compulsory unionism in public employment, then, is also a political question. Indeed, this Court has already indicated as much by saying that "[t]he right * * * to discuss, and inform people concerning, the advantages and disadvantages of unions * * * is protected not only as a part of free speech, *but as a part of free assembly.*" *Thomas* v. *Collins*, 323 U.S. 516, 532 (emphasis supplied), *rehearing denied*, 323 U.S. 819 (1945). If that is true with respect to unionism in the *private* sector, as *Thomas* held, it is true *a fortiori* with respect to unionism in the *public* sector. It is especially true at the present time, because of the ferment in public-sector labor relations caused by the recent spate of compulsory collective-bargaining laws enacted in many of the States. This Court has noted that, "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * Free discussion concerning the conditions in industry and the causes of labor disputed appears to us *indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.*" *Thornhill* v. *Alabama*, 310 U.S. 88, 102, 103 (1940) (emphasis supplied). How much more so is discussion "indispensable to the effective and intelligent use of the processes of popular government" where it deals with matters of labor policy in *public*-sector employment, need not be unduly emphasized.

In short, compulsory unionism for public employees is a matter of intense political concern which goes to the very heart of the American system of self-government.

B. All Citizens, Whether or not Public Employees and Whether or not Union Members, Have an Equal Interest and Right to Participate in Political Affairs.

The American system of representative, republican self-government embodies the Lockean presupposition that the state may act only for the *common* or *public* good. J. Locke, *Second Treatise on Government* § § 89, 110, 131, 135, 142. From this follows the precept that *all* of the people are entitled to an *equal* voice in the governmental process. *Id.* § 158. Equal representation is vital in the American scheme of government, because the ultimate authority of law, its binding character, depends in the final analysis upon the continuous assent of its subjects. A *republican* government has no existence separate from the people, but "rests on the foundation of a belief in rule by the people – not some, but all the people." *United Pub. Workers* v. *Mitchell,* 330 U.S. 75, 114 (1947) (Black, J., dissenting).

Certainly a scheme of political freedom can be structured on no basis other than an equality of representation and influence in the process of self-government. To be sure, the actions of government affect different individuals, classes, and interests in different and unequal ways. But there is no rational or objective means to measure these differences, or to compensate for them by "weighting" the voices of some differently from the voices of others. Therefore, the American system of government presumes – irrebuttably – that access to the political process must be available to all on an equal basis. And so this Court

has held, time and again. *E.g., Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Bullock* v. *Carter,* 405 U.S. 134 (1972); *Lubin* v. *Panish,* 415 U.S. 709 (1974); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

These cases recognize that fundamental to the very legitimacy of government under the American system is the freedom of political participation: the right to demand that the state function in the public interest and that each citizen enjoy an equality of legal opportunity to share in the process of government and to exercise a voice in the determination of public policy. *See* Call, "Federalism and the Ninth Amendment", 64 *Dick L. Rev.* 121, 122 (1960); Corwin, "The 'Higher Law' Background of American Constitutional Law" (pt. 1), 42 *Harv. L. Rev.* 149, 165 (1928).

The freedom of political participation, of course, extends to public employees as well as to all other citizens. On many occasions, this Court has "unequivocally rejected" the "suggest[ion] that teachers may constitutionally be compelled to relinquish the * * * rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work * * *." *Pickering* v. *Board of Educ.,* 391 U.S. 563, 568 (1968), *citing Wieman* v. *Updegraff,* 344 U.S. 183 (1952); *Shelton* v. *Tucker,* 364 U.S. 479 (1960);

and Keyishian v. *Board of Regents*, 385 U.S. 589 (1967). A teacher's mere nonmembership in a labor union cannot consistently with the Constitution change this result.

C. Whatever Its Validity May Be in Other Contexts, as Applied by the Wisconsin Supreme Court in This Case, the "Exclusive-Representation" Device Unconstitutionally Elevates the Political Influence of One Class of Citizens Over Another.

The decision of the Wisconsin Supreme Court is at war with this concept of political equality for all citizens. In substance, it affirms the power of the Wisconsin Employment Relations Commission to censor the speech and petition of certain citizens on the basis (i) of the *content* of their speech, and (ii) of their *associational* preferences. This is a complex constitutional violation arising at the intersection of the Due Process and Equal Protection Clauses of The Fourteenth Amendment. *See Chicago Police Dep't* v. *Mosley*, 408 U.S. 92, 94-99 (1972). But it is a violation for which a simple response is adequate: namely, that the stifling of political speech has no place in the American system of self-government, whatever interests it may purportedly serve.

Reference to a striking historical parallel is appropriate here. Before the Civil War, apologists for the "peculiar institution" of slavery rationalized their opposition to the receipt by Congress of petitions from Negro chattel slaves on the ground that "[a] slave is

not a citizen in the eye of the Constitution. *His political existence is merged in that of his master.*" *Congressional Globe*, 24th Cong., 2d Sess. 182 (1837) (Rep. Vanderpoel) (emphasis supplied). To them, this "merger" was an inherent characteristic of slavery with which freedom of petition whould be wholly inconsistent, and without which the exceptional political influence of the slave power would be in jeopardy. *See* A. Lincoln, Speech at Peoria, Ill., 16 Oct., 1854, in 2 *Collected Works* 268-69 (Basler ed. 1955) (criticizing slavery as giving the South unequal representation in Congress). The decision of the Wisconsin Court effects the same sort of "merger" by denying nonunion public-school teachers the privilege to petition their government – either as public employees or as citizens – on matters "subject to collective bargaining". To the extent that this merger is effective, it extinguishes those employees' "political existence" and denies them their "citizen[ship] in the eye of the Constitution" in the same way, if not to the same degree, that chattel slaves suffered such a disability under the "peculiar institution". In short, it imposes upon them a political badge or incident of slavery – *for the obvious purpose of enhancing the political "solidarity" and power of public-employee unions as against society.*

This result alone should be enough to condemn the decision of the Wisconsin Court as repugnant *per se* to the First and Fourteenth Amendments – indeed, to the entire Constitution as a charter of republican self-government. For "[t]he very idea of a government, republican in form, implies a right on the part of its citizens" – *all* of its citizens – "to petition for a redress of grievances." *United States* v. *Cruikshank*, 92

U.S. 542, 552 (1876). To deny that right to any citizen is to except him from the most basic protection of the Constitution, and to violate the fundamental duty of every free government – indeed, to deny the very existence of a republican government in so far as he is concerned. And to countenance such a result is to draw into question the very legitimacy of our political institutions.

CONCLUSION

The decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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